Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

BAWOL CABIRI and EFUA CABIRI,
Petitioners,

- against -

GOVERNMENT OF THE REPUBLIC OF GHANA,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court below rule erroneously, and in direct conflict with this Court's prior interpretations of the Federal Tort Claims Act, that a non-commercial tort is deserving of immunity under the statutory exception for misrepresentation and deceit found in both the Foreign Sovereign Immunities Act and Federal Tort Claims Act?

2. Did the Court below, in reaching a decision admittedly in conflict with that of the Court of Appeals for the Ninth Circuit in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993), rule erroneously that a foreign state, that used courts in the United States as an instrument of persecution against individuals residing in the United States, has not waived its immunity under the Foreign Sovereign Immunities Act?

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Petitioners Bawol Cabiri and Efua Cabiri pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on January 25, 1999.

OPINIONS BELOW

The Opinion of the Court of Appeals, 165 F.3d 193 (2d Cir. 1999), is annexed hereto as Appendix A, pages 1a - 27a.[1] The Court of Appeals affirmed in part and reversed in part the Judgment of the United States District Court for the Eastern District of New York which dismissed all claims against Respondent by granting Respondent's motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. Section 1602, *et seq*. The Opinion of the District Court, 981 F. Supp. 129 (E.D.N.Y. 1997), is annexed hereto as App. B, p. 28a - 39a.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its Opinion on January 25, 1999. App. A, p. 1a. This Petition for Writ of Certiorari is filed within 90 days of the entry of the Opinion of the Court of Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

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[1] Citations to the Appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i) will appear as follows: "App. __, p.__."

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

United States Code Section 1605(a) provides in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–
>
> * * *
>
> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to:
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

STATEMENT OF THE CASE

This action arose from the Government of Ghana's scheme to persecute the Cabiri family and repatriate them to Ghana. Under ordinary circumstances, such claims would be

out of the reach of the U.S. court system; however, here, Ghana's actions made the immunity ordinarily provided to foreign governments under the FSIA inapplicable.

A. Nature of the Case

This is an action to recover damages from Ghana for breach of its employment contract with Bawol Cabiri and related torts against Bawol Cabiri and his wife, Efua Cabiri.

Bawol Cabiri was Ghana's trade representative to the United States in the early and mid-1980's. In 1986 he was recalled by way of ruse to Ghana, imprisoned and tortured and was unable to return to the United States, where his wife, Efua Cabiri, and his young children resided. While Bawol Cabiri was being held in Ghana, Efua Cabiri was subjected to harassment and abuse by officials at Ghana's New York mission, all in an effort to cause Efua Cabiri anxiety and fear so that she would return to Ghana with her family and no longer pursue her efforts to gain the freedom of her husband Bawol Cabiri.

Ghana resorted to filing suit in New York state court as an integral part of its scheme of persecution against Bawol Cabiri and his family (the "State Court Action"). Ghana commenced the State Court Action to evict the Cabiri family from the residence owned by the Government of Ghana in which the Cabiri family lived rent-free incident to Bawol Cabiri's employment. Since Efua Cabiri had no means to support herself and her family while Bawol Cabiri was held in Ghana, the Cabiri family depended on the free housing they received from Ghana in order to stay in the United States. By evicting the Cabiri family, Ghana sought to cause Efua Cabiri and her children to leave the United States and return to Ghana.

Bawol Cabiri has pled claims against Ghana for breach of contract, abuse of trust, fraudulent misrepresentation, false imprisonment and intentional infliction of emotional distress. Efua Cabiri has pled a claim for intentional infliction of emotional distress. The claims of Bawol Cabiri arose out of his employment as Ghana's trade representative to the United States and are predicated upon actions that took place in the United States and Ghana. Efua Cabiri seeks recovery for the tortious acts committed against her in the United States by officials of Ghana's New York mission.

B. Proceedings Below

This action was commenced in the United States District Court for the Eastern District of New York by a complaint filed and served on December 29, 1995. In lieu of an answer, on February 23, 1996, Respondent moved to dismiss all claims asserted against it for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Respondent argued that there had been no waiver of its foreign sovereign immunity that could confer subject matter jurisdiction upon the district court.

In its Memorandum and Order of October 22, 1997, the district court dismissed all claims brought by the Cabiris. App. B, p. 39a.

Petitioners appealed the final judgment of the District Court pursuant to 28 U.S.C. Section 1291 and Fed. R. App. P. 4(a). The Court below heard argument on June 24, 1998. In its January 26, 1999 Opinion, the Court below affirmed in part and reversed in part. First, the Court below unanimously reversed the District Court's dismissal of Bawol Cabiri's contract claim. The Court below held that the contract claim arose from the same transaction or occurrence as the State Court Action but the tort claims did not. Therefore, the

counterclaim exception to the Foreign Sovereign Immunities Act provided subject matter jurisdiction for the court to hear Bawol Cabiri's contract claim. App. A, p. 4a.

Second, the Court below affirmed 2-1 the District Court's determination that there was no subject matter jurisdiction over Efua Cabiri's claim for intentional infliction of emotional distress. The Court below held that Respondent was immune from Efua Cabiri's claim under the misrepresentation and deceit exception of the Foreign Sovereign Immunities Act. App. A, p. 18a. The dissent disagreed, writing that the misrepresentation and deceit exception, identical to the misrepresentation and deceit exception found in the Federal Tort Claims Act, has been interpreted by five Circuit Court of Appeals as well as by this Court, to be limited to commercial torts. Specifically, the dissent explained that Efua Cabiri's claim for intentional infliction of emotional distress was, "not a 'claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights,' with respect to which a foreign state still can claim immunity from liability under 28 U.S.C. § 1605(a)(5)(B). *See Gross v. United States*, 676 F.2d 295, 304 (8th Cir.1982)." App. A, p. 23a - 24a. Therefore, the dissent reasoned, Respondent should not be granted immunity from the claim of Efua Cabiri.

Finally, the Court Below unanimously held that even if Respondent's were to have used the United States courts as an instrument in their scheme against the Cabiris, such an action would not be sufficient to waive sovereign immunity. Expressly disagreeing with the decision of the Ninth Circuit in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), the Court below characterized the *Siderman* Court as an "adventurous panel of the Ninth Circuit," App. A, p. 21a, and further attacked *Siderman* as being "new and

dubious" and the product of "largely inapt citation." App. A, p. 22a.

C. Statement of Facts

Bawol and Efua Cabiri are natives of Ghana and are presently permanent resident aliens in the United States. As a result of the events surrounding Ghana's employment of Bawol Cabiri and the resulting legal proceedings, the Cabiris are unable to return to Ghana without grave risk to their personal safety. Recognizing this, the U.S. State Department determined that the Cabiri family would have a "well-founded fear of persecution" in Ghana, and granted Efua Cabiri asylum in 1988. Bawol Cabiri was granted asylum in 1993.

1. Ghana's Acts Against Bawol Cabiri

At all relevant times, Ghana employed Bawol Cabiri as its trade representative to the United States. The benefits and obligations of the position of trade representative, and government service generally, were defined by an employment agreement between Ghana and Bawol Cabiri. In connection with Bawol Cabiri's employment as trade representative, the Cabiri family was given possession of a house owned by Ghana in Westbury, New York (the "Westbury House").

Prior to July 1986, certain officials of Ghana, motivated by political, personal, and tribal prejudices, formulated a scheme to deprive Bawol Cabiri of the benefits of his government post, and subject him, without cause or justification, to torture, false imprisonment, false arrest, physical and mental abuse, and internal exile. These officials, through various acts, including actions taken within the territory of the United States of America, took measures to cause Bawol Cabiri to be fraudulently "recalled" to Ghana for

a one-week "consultation" in July 1986. The "recall" was a ruse intended solely to fraudulently induce Bawol Cabiri to leave New York and return to Ghana where defendant intended to bring to fruition its wrongful scheme to deprive Bawol Cabiri of his liberty and property.

Bawol Cabiri arrived in Ghana on July 31, 1986, and reported to the Ministry of Trade for his alleged consultation. Upon arriving for the consultation, he was forcibly removed from the Ministry of Trade by three members of Ghana's Bureau of National Investigation ("B.N.I."). B.N.I. is the state agency charged, according to the United States State Department, with prosecuting "political offenses." Bawol Cabiri was imprisoned for nearly a year in detention camps run by the B.N.I., where he was held without cause and without charge. While imprisoned, Mr. Cabiri was subjected to ongoing physical and mental abuse and torture, including mock executions, electric shock torture, and severe beatings resulting in permanent physical injuries.

2. Ghana's Attempt To "Repatriate" the Cabiri Family Through Litigation and Intimidation In the United States

On September 1, 1986, Captain Kojo Tsikata ("Tsikata"), Ghana's Head of National Security, requested, in an internal government memorandum, that Ghana "arrange" to "repatriate" the Cabiri family by September 30, 1986.[2] Shortly thereafter, at the direction of Tsikata, Ghana, acting through its New York Mission, began to subject Efua Cabiri,

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[2] Tsikata is greatly feared in Ghana and has been named by a Board established by the Attorney-General of Ghana as the "mastermind" of a plot which resulted in the murder of three of Ghana's High Court Judges.

who remained in New York during the course of Bawol Cabiri's detention, to threats and intimidation in an attempt to force Efua Cabiri and her children to leave the Westbury House and return to Ghana. Ghanaian Officials in the United States, (i) lied to her regarding her husbands whereabouts; (ii) threatened her and her family; and (iii) warned her that a "black woman from Africa" could not get justice in a court in the United States. These acts were perpetrated on her while she was at the Westbury House caring for her children.

Ghana also refused to provide Efua Cabiri with any information regarding her husband's whereabouts or physical condition, despite her repeated requests. Instead, Ghana intentionally provided Efua Cabiri with false information about her husband through a letter stating that Bawol Cabiri's whereabouts were unknown to Ghana. These actions were all taken by Ghanaian representatives in the United States to pressure Efua Cabiri to leave the United States and return to Ghana where she would be unable to bring public scrutiny to the plight of her husband.

As a final attempt to "repatriate" the Cabiri family to Ghana, Ghana commenced the State Court Action in October 1987 to evict the Cabiri family from the Westbury House in which the Cabiri family lived rent-free incident to Bawol Cabiri's employment. Since Efua Cabiri had no visible means to support herself and her family while Bawol Cabiri was held in Ghana, the Cabiri family appeared to depend on the free housing they received from Ghana in order to stay in the United States. By evicting the Cabiri family, Ghana sought to cause Efua Cabiri and her children to leave the United States and return to Ghana. In furtherance of its scheme, Ghana made false representations to the court regarding Bawol Cabiri's presence in Ghana and the status of his employment.

3. Bawol Cabiri Was Pressured To Assist Ghana With The State Court Action Until His Release In June 1991

Bawol Cabiri was not allowed to return to the United States until June 1991, almost five years after his "recall." Throughout his imprisonment and internal exile in Ghana, Bawol Cabiri was not allowed to freely communicate with either his family or counsel. During this period, Ghana frequently attempted to compel Bawol Cabiri, through threats and force, to persuade his wife to abandon her counterclaims and return to Ghana with her family.

ARGUMENT FOR GRANTING WRIT

The Court below applied the exceptions to the statutory immunity accorded to foreign sovereigns under the FSIA in a manner that is far more deferential to the conduct of a foreign sovereign than that necessitated by the statutory language and intended by Congress. First, the Court below has misinterpreted a long line of cases that have expressly limited immunity for "misrepresentation" and "deceit" under the FSIA and the Federal Tort Claims Act to instances that are commercial by nature. By failing to properly apply this precedent, the Court below undermines the consistent application of immunity standards across the federal circuits for both the FSIA and the Federal Tort Claims Act.

Further, the Court below was the first court to immunize foreign nations from suit if they engage in the offensive use of the U.S. court system to further extraterritorial objectives through the persecution or harassment of individuals who reside in the United States, including political asylees. In attacking the common sense rule espoused by the Ninth Circuit in *Siderman de Blake v. Republic of Argentina*, *supra*, the Court below created uncertainty regarding the conduct of a foreign nation subject to immunity. Although the circumstances of the case at bar and of Siderman are indeed extreme, the differences between the Ninth Circuit and the Second Circuit are pronounced and underline far different interpretations of the scope and purpose of the FSIA that will continue to lead to disparate applications of immunity if not reconciled by this Court.

ARGUMENT I

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH PRECEDENTS OF THIS COURT ON THE ISSUE OF WHETHER A FOREIGN STATE SHOULD BE GRANTED IMMUNITY FOR ITS NON-COMMERCIAL, NON-ECONOMIC TORTS

Efua Cabiri's claim for intentional infliction of emotional distress is not derivative of the wrongs committed against Bawol Cabiri, but is founded on the tortious acts of officials of Ghana in the United States taken against Efua Cabiri while she was in New York. Under an express exception to the FSIA for non-commercial torts, United States courts have subject matter jurisdiction over foreign states who, through their officials or employees, commit tortious acts on United States soil. Efua Cabiri was continuously subjected to both oral harassment and psychological torture by Ghanian officials in the United States, actions that rose to the level of intentional infliction of emotional distress. Pursuant to the FSIA, Ghana is not immune from her claim.

A. Efua Cabiri's Claim for intentional infliction of emotional distress falls squarely under the non-commercial tort exception to the FSIA.

The non-commercial tort exception of the FSIA is set forth in 28 U.S.C. Section 1605(a)(5) and provides in relevant part that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–

> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. § 1605(a)(5).

Here, Efua Cabiri seeks monetary damages for personal injury occurring in the United States, caused by the non-commercial torts of Ghanian officials acting within the scope of their office. The fact that the actions of the officials at Ghana's New York mission may have been coordinated by, or were part of a larger scheme perpetrated by, officials within Ghana does not immunize Ghana from answering for its torts committed on United States soil. *See Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (section 1605(a)(5) exception applies, giving court subject matter jurisdiction in case emanating from assassination of Chilean dissident leader in the United States).

At the direction of Capt. Tsikata, Ghana, acting through its New York Mission, subjected Efua Cabiri, who remained

in New York during the course of Bawol Cabiri's detention, to threats and intimidation in an attempt to force Efua Cabiri and her children to leave the Westbury House and return to Ghana. Ghana also refused to provide Efua Cabiri with any information regarding her husband's whereabouts or physical condition, despite her repeated requests. Instead, Ghana intentionally provided Efua Cabiri with false information about her husband through a letter stating that Bawol Cabiri's whereabouts were unknown to Ghana. As became apparent later, this was not true; Ghana had been holding Bawol Cabiri in prison for almost four months by the time Ghana sent the October 29, 1986 letter. After the above-described actions failed to "repatriate" Efua Cabiri to Ghana, Ghana commenced the State Court Action.

In light of Ghana's non-commercial, tortious conduct, perpetrated in the United States, Section 1605(a)(5) of the FSIA gives this Court subject matter jurisdiction over Efua Cabiri's claim. *See Letelier*, 488 F. Supp. at 673. *See also De Sanchez v. Banco Central de Nicaragua*, 515 F. Supp. 900 (E.D. La. 1981) (non-commercial tortious activity exception to FSIA applies to claim for property damage by Nicaragua in the United States). Ghana has waived its immunity from Efua Cabiri's claim pursuant to the non-commercial tort exception of the FSIA.

B. The Court below has undermined long standing precedent relating to both the FSIA and the Federal Tort Claims Act by construing the non-commercial tort exception far too narrowly.

In affirming the dismissal of Efua Cabiri's claim, the Court below relies entirely on the provision of the non-commercial tort exception that provides that this exception shall not be applicable to, "any claim arising out of malicious prosecution, abuse of process, libel, slander,

misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 1605(a)(5)(B). The Court below concluded that because Efua Cabiri's alleged injury was at least in part caused by misrepresentations made by officials of Ghana regarding her husbands whereabouts, Ghana is entitled to immunity under Section 1605(a)(5)(B).

An identical provision to Section 1605(a)(5)(B) is found in the Federal Tort Claims Act. 28 U.S.C. § 2680 (h). The identity of these provisions is expressly recognized in the legislative history of the FSIA. H.R. Rep. No. 94-1487, at 20-21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6620. The long line of precedent underlying the above provisions of the Federal Tort Claims Act are inapposite to the Court below's determination that the wrongs committed against Efua Cabiri were misrepresentations within the meaning of 28 U.S.C. § 1605(a)(B) and 28 U.S.C. § 2680(h).

The failure of the lower court to follow long established precedent was aptly set forth in the dissent to the decision of the Court below:

> The fallacy in this reasoning is that claims for misrepresentation and deceit generally are limited to actions which involve commercial decisions predicated on incorrect or incomplete information. *See Block v. Neal*, 460 U.S. 289, 296 n.5 (1983)(citing *United States v. Neustadt*, 366 U.S. 696, 711 n.26 (1961)); *Kohn v. United States*, 680 F.2d 922, 926 (2d Cir.1982); *Salter v. United States*,. 853 F.Supp. 389, 394 (M.D. Ala.1994). This limitation accords with the traditional interpretation of actions based on misrepresentation and deceit, which require a showing of tangible or pecuniary loss. *See,*

> *e.g.*, *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1043-45 (2d Cir.), *cert. denied*, 479 U.S. 950 (1986); *Day v. Avery*, 548 F.2d 1018, 1029 (D.C. Cir.1976), *cert. denied*, 431 U.S. 908 (1977); *Leung v. Lotus Ride, Inc.*, 198 A.D.2d 155, 156 (N.Y.1993); *Urtz v. New York Central and Hudson River Railroad*, 202 N.Y. 170, 173 (1911); 37 C.J.S. *Fraud* § 52.

App. A, p. 24a - 25a. The dissent continued:

> Indeed, the pertinent immunity provisions of § 2680(h) are identical with those of § 1605; i.e., "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights."
>
> I deem it significant that five Circuits, including the Second, *see Kohn*, supra, have held that claims based on the intentional infliction of emotional distress do not fall within the definition of torts listed in the above-quoted section 2680(h). *See Truman v. United States*, 26 F.3d 592, 596-97 (5th Cir. 1994). I believe, therefore, that they do not fall within the definitions of torts listed in 28 U.S.C. § 1605(a)(5)(B).

Id. at 25a.

The error of the Court below is made all the more obvious through an inspection of the relevant precedent of this Court. In *Neustadt*, this Court wrote:

> As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of 'misrepresentation,' in the generic sense of that word, but '(s)o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit,' and has been confined 'very largely to the invasion of interests of a financial or commercial character, in the course of business dealings.' Prosser, Torts, § 85, 'Remedies for Misrepresentation,' at 702-703 (1941 ed.). See also 2 Harper and James, Torts, § 29.13, at 1655 (1956).

Neustadt, 366 U.S. at 711 n.26. See *Block v. Neal*, 460 U.S. 289, 296 n.5.

The wrongdoing suffered by Efua Cabiri at the hands of Ghanaian officials was neither economic or commercial in nature. There is no basis for immunizing Ghana from responsibility for the non-commercial torts committed by its officials in the United States. The Court below has deviated from the accepted statutory interpretation of the FSIA and the Federal Tort Claims Act, undermining the precedential value of the above-cited cases. Absent review by this Court, the inconsistent interpretation of these statutory provisions adopted by the Court below will be allowed to fester and lead to uncertainty and unnecessary litigation on an issue that had been well-settled.

ARGUMENT II

THE DECISION OF THE COURT BELOW IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN *SIDERMAN DE BLAKE V. REPUBLIC OF ARGENTINA* AND UNNECESSARILY IMMUNIZES FOREIGN NATIONS FROM BEING HELD ACCOUNTABLE FOR THE OFFENSIVE USE OF THE UNITED STATES COURT SYSTEM TO FURTHER EXTRATERRITORIAL OBJECTIVES THROUGH THE PERSECUTION OR HARASSMENT OF INDIVIDUALS WHO RESIDE IN THE UNITED STATES

Ghana has used litigation in an American court as an instrument of oppression in its vendetta against the Cabiris. Such an abuse of the United States judicial process is an implied waiver of sovereign immunity as to claims that are directly related to Ghana's scheme. As plead, the scheme suffered by the Cabiri family at the hands of Ghana is closely analogous to the scheme perpetrated by Argentina against the Siderman family that resulted in the Ninth Circuit decision in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

Rather than following Siderman, the Court below attacked the Ninth Circuit precedent with particularly strong language:

> Siderman's subsequent federal lawsuit, seeking damages from Argentina for torture and other persecutions, was dismissed by the district judge, but revived by an adventurous panel of the Ninth Circuit on the ground that Argentina may have waived sovereign immunity by seeking the

> assistance of a court in the United States in furthering a scheme of persecution from which Siderman's claim arose.

App. A, p. 21a. The Court below continued its attack on the Ninth Circuit with equally sharp language:

> *Siderman* itself relies on largely inapt citation to cases in which the issue was whether treaties or written agreements entered into by foreign sovereigns contemplated the adjudication of disputes by courts in the United States. *See id.* at 721. The implicit theory of *Siderman* is new and dubious, and seems to be that a foreign state forfeits immunity with respect to matters related to a scheme of persecution if it advances that scheme by bringing suit in the United States.

App. A, p. 22a. Contrary to the decision of the Court below, *Siderman* was a narrowly crafted exception to foreign sovereign immunity. Upon close examination, the Cabiri circumstances compare favorably to that of the Sidermans.

In *Siderman*, gunmen acting under the instructions of Argentina's ruling military junta kidnapped Jose Siderman, tortured him for days, and forced the entire Siderman family to flee to the United States. In their haste to escape, the Sidermans were forced to sell their interest in 127,000 acres of land; the military government subsequently altered property records to show that the Sidermans only owned 127 acres of land, and then brought criminal charges against Jose for selling land he did not own. To further its scheme, the government caused Jose to be served with process relating to the criminal action in the United States, utilizing a California state court for that purpose. When the Sidermans brought suit

in federal court to redress these wrongs, the Ninth Circuit held that the Argentine government's use of the American judicial system to continue its persecution of the Sidermans effected an implied waiver of sovereign immunity as to the Sidermans' torture claims. *Siderman*, 965 F.2d at 722.

The facts in Siderman are strikingly close to those of this case: in both instances foreign governments, not content with the unlawful detention torture and persecution of its victims in their homeland, utilized the American judicial system as an instrument of persecution. Indeed, in *Siderman* American courts were implicated only tangentially, through the ministerial function of service of process via a letter rogatory; yet, even this abuse of U.S. process was held to be an implied waiver of sovereign immunity. *Siderman*, 965 F.2d at 721 - 22. In reaching this result, the Ninth Circuit drew on cases involving contracts contemplating enforcement in the United States, stating that an implied waiver is generally found where the foreign government "contemplated the involvement of United States courts in the affair at issue." *Id.* at 721. Applying that rule, the Ninth Circuit concluded that since Argentina "deliberately implicated" American courts through use of the letter rogatory, its sovereign immunity was waived. *Id.* at 722.

In the State Court Action, Ghana "deliberately implicated" an American court in a more egregious manner than Argentina did in Siderman -- Ghana actually brought a suit in New York state court which was predicated on lies and was in furtherance of its scheme against the Cabiri family. Ghana brought the State Court Action to force Efua Cabiri and her children to leave the Westbury House. By bringing suit, Ghana necessarily contemplated the involvement of United States courts in redressing the issues surrounding Bawol Cabiri, his employment, and its scheme to persecute

the Cabiris.

In order to evict the family, Ghana had to demonstrate that the Cabiris time for possession had expired. Pursuant to the terms of Bawol Cabiri's employment, his family had possession of the Westbury House until he was lawfully terminated or given six months notice prior to his return to civil service in Ghana. When Ghana brought the State Court Action, it pled that Bawol Cabiri had been lawfully terminated. At that time, Ghana still held Bawol Cabiri in a Ghanaian prison and must have known that his employment had not been lawfully terminated. Further, Ghana took affirmative actions almost four years after the commencement of the State Court Action which established that Bawol Cabiri continued as an official of the government of Ghana. Thus, the State Court Action had little more basis in fact than the criminal charges in *Siderman*.

Contrary to the analysis of the Court below, the implied waiver exception for malicious litigation established in *Siderman* does not require that the use of the United States court which gave rise to the waiver of immunity not involve a "real dispute." The letter rogatory requested by Argentina in *Siderman* was itself a real judicial act that was predicated on a meritless, but very real criminal proceeding in Argentina. It was the criminal proceeding in Argentina that was the sham. Likewise, the State Court Action may appear to be a "real dispute," but it was predicated on Ghana's sham termination and imprisonment of Bawol Cabiri.

Further, there is uncontroverted evidence that senior officials in the Ghanaian government wanted Efua Cabiri and her family returned to Ghana because she was attempting to attract press attention to the plight of Bawol Cabiri. During discovery in the State Court Action, Ghana produced a memorandum from Tsikata, Ghana's Head of National

Security to Ghana's Secretary of Trade and Secretary for Foreign Affairs. In the memorandum, Tsikata requests that Ghana "arrange" to "repatriate" the family of Mr. Cabiri by September 30, 1986. Shortly after Tsikata sent his memorandum, Ghana began to threaten, intimidate and harass Mrs. Cabiri. After those efforts failed, Ghana filed the State Court Action. Although Ghana's success in evicting the Cabiri family would not necessarily require the Cabiri family to return to Ghana, it would certainly make it much more likely. After all, Efua Cabiri was, at the time, a single parent with four children and no visible means of support. From the possible perspective of the Ghanaian government, if Efua Cabiri did not have free housing in the United States she would have little choice but to return to Ghana.

Ghana allowed Bawol Cabiri to leave Ghana four years after the State Court Action was commenced and a little over two years after the State Court Action was stayed by the New York court. Ghana failed to take any steps to prosecute the State Court Action until November 1993 – over two years after Bawol Cabiri had returned to the United States. When the State Court Action settled in July 1995, the Cabiris were allowed to live in the Westbury House for an additional year and Ghana received no use and occupancy to Ghana for the nine years the Cabiris had lived in the Westbury house since Ghana had commenced the State Court Action. Thus, Ghana only aggressively pursued the State Court Action while it was an effective tool to harass, intimidate and possibly repatriate the Cabiri family and bring its scheme against Bawol Cabiri to fruition. Such a use of the United States court system should not be countenanced.

The implied waiver recognized in *Siderman* is necessary to protect our judicial system from abuse by foreign sovereigns who may seek to utilize the courts' power to

further an agenda of persecution. A foreign sovereign so using the United States courts has certainly contemplated, or should have contemplated, the involvement of the courts to resolve both sides of the affair at issue. In some instances the ability of the courts to cause a foreign sovereign to answer for its malicious acts should exceed that set forth by the four corners of the counterclaim exception. Although such an implied waiver is applicable in very few circumstances, its availability helps insure that foreign sovereigns cannot hide beyond the shield of immunity and use the United States courts as a tool of repression. For such a doctrine to be an effective deterrent to future schemes and wrongdoing, the federal courts should recognize a uniform standard, and it is incumbent on this Court to determine whether the standard has been properly enunciated by the Ninth Circuit in *Siderman* or by the Court below.

CONCLUSION

The Court below has applied the exceptions to the statutory immunity accorded to foreign sovereigns under the FSIA in a manner that is far more deferential to the conduct of a foreign sovereign than that necessitated by the statutory language and intended by Congress. This precedent may lead to inconsistent adjudication of immunity, under both the Federal Tort Claims Act and the FSIA. Unchecked by this Court, the inconsistent interpretation of these statutory provisions adopted by the Court below will be allowed to fester and lead to uncertainty and unnecessary litigation on an issue that had been well-settled.

Further, the Court below was the first court to immunize foreign nations from suit if they engage in the offensive use of the U.S. court system to further extraterritorial objectives

through the persecution or harassment of individuals who reside in the United States, including political asylees. The differences that have come to light between the Ninth Circuit and the Second Circuit are pronounced and underline far different interpretations of the scope and purpose of the FSIA that will continue to lead to disparate applications of immunity if not reconciled by this Court.

For all of the reasons stated herein, it is respectfully submitted that certiorari should be granted.

Respectfully submitted,

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Filed January 25, 1999]

No. 97-9563

BAWOL CABIRI and EFUA CABIRI,
Plaintiffs-Appellants.

v.

GOVERNMENT OF THE REPUBLIC OF GHANA,
Defendant-Appellee.

OPINION

No. 1997--August Term, 1997
Argued: June 24, 1998
Decided: January 25, 1999

Before: VAN GRAAFEILAND, McLAUGHLIN and JACOBS, Circuit Judges.

Plaintiffs appeal from a judgment of the United States District Court for the Eastern District of New York (Wexler, J.) dismissing their various state law claims, pursuant to Fed. R. Civ. P. 12(b) (1), for lack of subject matter jurisdiction

under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 160211 (1994). On appeal, plaintiffs claim that defendant Republic of Ghana lacks sovereign immunity (i) as to all of their claims, by virtue of the counterclaim exception to the FSIA, 28 U.S.C. § 1607 (1994), (ii) as to Efua Cabiri's claim for intentional infliction of emotional distress, by virtue of the FSIA exception for non-commercial torts committed in the United States, 28 U.S.C. § 1605(a) (5) (1994), and (iii) as to all of their claims, by virtue of the implied waiver exception to the FSIA, 28 U.S.C. § 1605 (a) (1) (1994).

Affirmed in part, reversed in part and remanded. Judge VanGraafeiland concurs in part and dissents in part in a separate opinion.

SCOTT A. KAMBER, New York, NY (Wechsler Harwood Halebian & Feffer LLP, on the brief), for Plaintiffs-Appellants.

MICHAEL S. COLE, New York, NY (Cascone & Cole, on the brief), for Defendant-Appellee.

JACOBS, Circuit Judge:

Bawol Cabiri was employed by the Republic of Ghana ("Ghana") as its trade representative to the United States, and enjoyed the use of a house in Westbury, New York pursuant to his employment contract. In 1986, Ghana summoned Cabiri home--where he alleges that he was detained and tortured--and undertook to discharge Cabiri from his post. When Ghana sued in state court to evict the Cabiri family from the Westbury house in which they had remained after Bawol Cabiri was recalled, Bawol Cabiri asserted

counterclaims for breach of contract, abuse of trust, fraudulent misrepresentation, false imprisonment, and intentional infliction of emotional distress. His wife, Efua Cabiri, asserted a counterclaim for intentional infliction of emotional distress.

After the parties settled the eviction proceeding, the Cabiris repleaded their counterclaims in an action against Ghana in the United States District Court for the Eastern District of New York (Wexler, J.). The Cabiris now appeal from a judgment dismissing their claims for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-11 (1994).

Under the FSIA, a foreign state is generally immune from the jurisdiction of the courts of the United States, subject however to implied waiver, 28 U.S.C. § 1605(a) (1), and to certain other exceptions, including one for counterclaims "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state," id. § 1607, and another for noncommercial torts committed in the United States, id. § 1605(a) (5). The Cabiris contend (1) that all of their claims fall within the counterclaim exception; (2) that Efua Cabiri's claim of intentional infliction of emotional distress also falls within the noncommercial tort exception; and (3) that in any event Ghana has impliedly waived immunity with respect to all of their claims.

The district court disagreed, concluding that none of the Cabiris' claims fell within the FSIA's exceptions to immunity. We conclude that the only claim that falls within the counterclaim exception to the FSIA is Bawol Cabiri's breach of contract claim; that Efua Cabiri's claim for

intentional infliction of emotional distress is outside the FSIA's exception for non-commercial torts committed in the United States; and that Ghana has not waived its sovereign immunity with respect to any of the claims. We therefore reverse the judgment of the district court insofar as it dismissed Bawol Cabiri's breach of contract claim, and affirm in every other respect.

BACKGROUND

Pursuant to a 1983 contract of employment as Ghana's trade representative to the United States, Bawol Cabiri was given the use, for the duration of his employment, of a house owned by Ghana and located in Westbury, New York. In July 1986, Cabiri was summoned back to Ghana. He alleges that upon his return, he was detained and tortured as a suspect in a planned coup d'état. Cabiri was imprisoned for approximately a year, and was not allowed to return to the United States until 1991. During that time, his wife and family lived in the Westbury house.

In an internal government memorandum dated September 1, 1986, the head of Ghana's National Security apparatus proposed that Efua Cabiri and her children be repatriated. On April 16, 1987, Ghana wrote to Efua Cabiri purporting to "retire" her husband, effective October 31, 1986, and in October of 1987 brought a summary proceeding in Nassau County District Court to evict the Cabiri family from the Westbury house. Plaintiffs allege that, through the initiation of the eviction proceeding, as well as through "threats [and] intimidation," Ghana "attempted to force Efua Cabiri and her children to leave their residence . . . and return to Ghana."

By way of counterclaims to the eviction proceeding, Bawol Cabiri pleaded breach of contract, abuse of trust, fraudulent misrepresentation, false imprisonment, and intentional infliction of emotional distress, and Efua Cabiri asserted a single counterclaim for intentional infliction of emotional distress.

In the settlement of the eviction proceeding, the Cabiris agreed to vacate the house and assert their counterclaims in a new federal action, and the parties agreed that in that case Ghana would waive sovereign immunity to the extent that the counterclaim exception to the FSIA,[1] or any other exception, would have amounted to a waiver of sovereign immunity in the state proceeding.

The Cabiris then sued Ghana in the United States District Court for the Eastern District of New York (Wexler, J.), asserting the same claims they had raised as counterclaims in the state proceeding. They now appeal from a judgment dismissing their complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction under the FSIA. See Cabiri v. Government of the Republic of Ghana, 981 F. Supp. 129 (E.D.N.Y. 1997). On appeal, the Cabiris argue that Ghana lacks sovereign immunity (i) as to all of their claims, by virtue of the counterclaim exception to the FSIA, 28

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[1] Although the FSIA was recently amended, see Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-43 (1996), those amendments are not relevant here because they did not materially alter any of the provisions at issue on this appeal and because the parties stipulated that Ghana's sovereign immunity would be determined as of 1994.

U.S.C. § 1607 (1994), (ii) as to Efua Cabiri's claim for intentional infliction of emotional distress, by virtue of the FSIA's exception for non-commercial torts committed in the United States, 28 U.S.C. § 1605(a) (5) (1994), and (iii) as to all of their claims, by virtue of the implied waiver exception to the FSIA, 28 U.S.C. § 1605(a) (1) (1994).

DISCUSSION

The FSIA is the sole source for subject matter jurisdiction over any action against a foreign state. See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439, 109 S. Ct. 683, 690 (1989). Except as otherwise provided in 28 U.S.C. §§ 1605 to 1607, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. "Once the defendant presents a prima facie case that it is a foreign sovereign, the plaintiff has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with the alleged foreign sovereign." Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993) (citation omitted). "We review de novo the district court's conclusions of law regarding jurisdiction under the FSIA." Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 241 (2d Cir. 1994).

I The Counterclaim Exception

Plaintiffs argue that all of their claims--his for breach of contract, abuse of trust, fraudulent misrepresentation, and false imprisonment, and their claims for intentional infliction of emotional distress--fall within the FSIA's counterclaim

exception because they arose, like the eviction proceeding, out of Bawol Cabiri's employment relationship with Ghana.

> The counterclaim exception provides:
>
> > In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim
> >
> > . . .
> >
> > (b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; . . . .

28 U.S.C. § 1607 (1994). The FSIA House Report notes that the phrase "transaction or occurrence" in § 1607 corresponds to the test for compulsory counterclaims in Fed. R. Civ. P. 13(a), and gives as the rationale for the exception that "if a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before U.S. courts while avoiding any legal liabilities claimed against it and arising from that same transaction or occurrence." H.R. Rep. No. 94-1487, at 23 (1976), reprinted in, 1976 U.S.C.C.A.N. 6604, 6622.

To construe "transaction or occurrence" in § 1607(b), we look for guidance to cases that construe the same phrase in Rule 13(a). See, e.g., In re Oil Spill by the Amoco Cadiz, 491 F. Supp. 161, 168 (N.D. Ill. 1979); Restatement (Third) of Foreign Relations Law § 456 cmt. f (1986) ("Since the

phrase 'transaction or occurrence that is the subject matter of the claim' is the same in Section 1605(b) as in Rule 13(a), decisions construing that phrase as used in Rule 13(a) may serve as guidance in construing section 1605(b)."). Under Rule 13(a), a counterclaim is compulsory if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(a).

In Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S. Ct. 367 (1926), the seminal Supreme Court case on the "transaction" test, the Court emphasized the "flexible meaning" of the word: "It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." Id. at 610, 46 S. Ct. at 371. The Court therefore concluded that plaintiff's suit against a cotton exchange--alleging that the exchange violated the antitrust law by denying the plaintiff access to price quotations--arose out of the same transaction as the counterclaim in which the exchange alleged that the plaintiff was illegally receiving the quotations from an unauthorized source. The Court reasoned that the refusal to furnish the quotations was "the one circumstance without which neither party would have found it necessary to seek relief." Id.

We have construed the transaction or occurrence standard liberally:

> In determining whether a claim arises out of the transaction . . . that is the subject matter of the opposing party's claim, this Circuit generally has taken a broad view, not requiring an absolute identity of factual backgrounds

> . . . but only a logical relationship between them. This approach looks to the logical relationship between the claim and the counterclaim, and attempts to determine whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit.

United States v. Aquavella, 615 F.2d 12, 22 (2d Cir. 1980) (internal quotation marks and citations omitted); see also Computer Assocs. Int'l, Inc. v. Altai, Inc., 893 F.2d 26, 29 (2d Cir. 1990) ("The test for determining what constitutes the same transaction or occurrence is whether there exists a logical relationship between the claim and the counterclaim." (internal quotation marks omitted)).

The district court, applying the correct standard, decided that the Cabiris' claims are not logically related to the eviction, because the eviction "involved a summary proceeding requiring evidence of Ghana's ownership of the Westbury residence and its right to possession" while the Cabiris' claims "are far more complex, involve actions that occurred primarily in Ghana, and are completely independent of the Cabiris[']right to retain possession of the Westbury residence." Cabiri, 981 F. Supp. at 132 (E.D.N.Y. 1997). In addition, the district court found it significant that the evidence required to prove the eviction claim and the counterclaims was quite different. See id.

We analyze the applicability of the counterclaim exception to each of the claims separately:

1. Breach of Contract.

We think that Bawol Cabiri's breach of contract claim arises out of the same transactions as the eviction proceeding: Cabiri's employment contract and his termination. See Adam v. Jacobs, 950 F.2d 89, 92 (2d Cir. 1991) ("[U]nder Second Circuit case law, claims for rescission and enforcement arise out of the same transaction or occurrence."); see also Sage Realty Corp. v. Insurance Co. of N. Am., 34 F.3d 124, 129 (2d Cir. 1994) (holding that counterclaim concerning the proper calculation of additional rent and expenses under a lease arose from same transaction as claim for unpaid rent); 6 Charles Alan Wright et al., Federal Practice & Procedure § 1410, at 68 (2d ed. 1990) ("When the same contract serves as the basis for both the claims and the counterclaims, the logical relationship standard also has been satisfied.").

In his breach of contract claim, Cabiri alleges that Ghana prevented him from performing his duties as trade representative by detaining him, and that it failed to compensate him for his salary and expenses since October 1986, the date of his alleged retirement. The district court viewed the state court eviction proceeding solely in terms of the possessory interests at issue. See Cabiri, 981 F. Supp at 132. However, under the contract, Bawol Cabiri's possession of the property was an incident of his employment. So the main issue in the eviction proceeding (as recognized in Ghana's pleadings before the state court) was whether Cabiri's employment was lawfully terminated. The eviction proceeding and the breach of contract claim alike concern the same employment contract and relationship, and the core issue in both claims is whether Cabiri's employment was lawfully terminated.

2. Abuse of Trust and Fraudulent Misrepresentation.

Bawol Cabiri alleges that Ghana abused a relationship of trust (i.e., the employment relationship) by inducing him to return to Ghana under false pretenses. His fraudulent misrepresentation claim is based essentially on the same allegations. Unlike Cabiri's breach of contract claim, these two claims, and the evidence required to establish them, do not concern whether the contract was lawfully performed or terminated. We agree with the district court that there is no logical relationship between these claims and the eviction proceeding and therefore that these claims did not arise out of the same "transaction or occurrence."

Cabiri points out that these claims arise from the same employer-employee relationship that formed the basis for the Cabiris' tenancy in Westbury and that without the employment relationship, neither counterclaim could have arisen. But the whole thrust of Cabiri's contract claim is that his employment and his tenancy in Westbury was unaffected by the wrongful recall and detention, and the only link between the employment and these claims (for abuse of trust and fraudulent concealment) is that Cabiri's employment was used as a mere pretense to draw him home. Under the limitless principle of relation urged by Cabiri, a claim against an employer arising out of an assault by a fellow employee would arise from the same transaction as an employer's claim against the employee for stealing trade secrets.

Cabiri also argues that "[t]he logical relationship between the[se] claims is . . . demonstrated by the fact that the discovery required for the Cabiris to prove their federal claims is coextensive with the discovery the Cabiris sought to

support their defenses in the State Court Action." We disagree. The record suggests that some discovery in the state court action related to Cabiri's wrongful repatriation and his detention in Ghana; however, that discovery related to the counterclaims, and therefore does not suggest a factual nexus between those counterclaims (pleaded as claims here) and the eviction itself.

Cabiri also relies on a decision in a related action he brought against Baffour Assasie-Gyimah, a Ghanaian official who allegedly tortured Cabiri in Ghana. See Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1191 (S.D.N.Y. 1996). In that case, Cabiri served Assasie-Gyimah with process while Assasie-Gyimah was in New York for the purpose of being deposed for the state court eviction proceeding. In denying Assasie-Gyimah's motion to dismiss for lack of personal jurisdiction, Judge Schwartz acknowledged the general rule that "parties . . . coming from another jurisdiction are exempt from service of civil process while in attendance upon court," but held that the rule did not apply because "the very subject matter for [Assasie-Gyimah's] appearance in the [state action] is the subject matter for the lawsuit which is being brought against him now, and the two proceedings involve vindication of the same cluster of rights and interests." Id. at 1193-94 (internal quotation marks omitted). In holding that the actions dealt with the same subject matter, however, Judge Schwartz noted that Assasie-Gyimah was deposed to gather evidence to support Cabiri's counterclaims. See id. at 1194. Thus, Judge Schwartz did not implicitly decide that the eviction proceeding was related to the proceeding before him, only that the counterclaims were so related. Judge Schwartz's opinion does not undermine our conclusion that Bawol Cabiri's claims for abuse of trust and fraudulent misrepresentation do not arise

out of the same transaction as the eviction proceeding.

3. False Imprisonment; Intentional Infliction of Emotional Distress.

Bawol Cabiri's claims for false imprisonment and intentional infliction of emotional distress allege his imprisonment and torture, and Efua Cabiri's claim of intentional infliction of emotional distress alleges that officials at Ghana's New York mission refused to give her information about the location of her husband. Like the abuse of trust and fraudulent misrepresentation claims, the issues presented by these claims lack a sufficient logical relationship to Bawol Cabiri's employment contract and its termination. In addition, as with the abuse of trust and fraudulent misrepresentation claims, the discovery relating to plaintiffs' counterclaims for false imprisonment and intentional infliction of emotional distress is not properly viewed as "coextensive" with the discovery relating to the eviction proceeding, nor are we of the view that Judge Schwartz's holding in Cabiri v. Assasie-Gyimah evidences that these claims are related to the eviction proceeding.

II The Non-Commercial Tort Exception

Efua Cabiri contends that her claim for intentional infliction of emotional distress--in essence that the Ghanaian mission in the United States misrepresented her husband's whereabouts[2] --is based upon tortious acts within the United

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[2] Plaintiffs' complaint alleged the following facts in support of Efua Cabiri's intentional infliction of emotional distress

States by officials at Ghana's New York mission.

Under the FSIA, United States courts have subject matter jurisdiction over actions against foreign states that commit noncommercial tortious acts within the United States, subject however to certain provisos, one of which preserves immunity for torts of misrepresentation:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .
>
> (5) not otherwise encompassed in paragraph (2) above [which relates to commercial activities], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of

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claim:

> Defendant refused to provide Efua Cabiri with any information regarding her husband's whereabouts or physical condition, despite her repeated requests. Defendant intentionally provided Mrs. Cabiri false information about her husband through a letter stating that Bawol Cabiri's whereabouts were unknown to the Republic of Ghana. The letter was on the stationery of Ghana's New York Mission and was received at 34 Marietta Drive.

In addition, Efua Cabiri has claimed that one of the consular officials warned her that a "black woman from Africa" could not get justice in a United States court.

> property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights . . .[3]

28 U.S.C. § 1605 (emphasis added).

In an effort to plead around the proviso of subsection (a) (5) (B) the complaint is cast in terms of the intentional infliction of emotional distress. However cast, the wrongful acts alleged to have caused the injury are misrepresentations made to Efua Cabiri concerning her husband's whereabouts. Because this claim therefore is subject to the proviso of § 1605(a) (5) (B), it falls outside the non-commercial tort exception, and the district court properly dismissed it.

Plaintiff argues for a very broad reading of the FSIA language that waives sovereign immunity for "personal injury," and for a reading of the proviso for

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[3] Although cast in terms that may be read to require that only the injury rather than the tortious acts occur in the United States, the Supreme Court has held that this exception "covers only torts occurring within the territorial jurisdiction of the United States." Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 441, 109 S. Ct. 683, 692 (1989).

"misrepresentation" and "deceit" so narrow as to nullify it. The FSIA House Report says of § 1605 (a) (5) that, although "cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by Section 1605(a) (2) relating to commercial activities," it "is directed primarily at the problem of traffic accidents." H.R. Rep. No. 94-1487, at 20-21 (1976), reprinted in, 1976 U.S.C.C.A.N. 6604, 6619. This observation is not altogether helpful, but we do not have to limit § 1605(a) (5) to the roadway in order to conclude with confidence that Ghana enjoys immunity as to this claim--for emotional injury caused by the refusal of a foreign state, however nefarious, to give its citizens in the United States full or truthful information concerning its operations. The FSIA is not an enforcement mechanism for global freedom of information.

This Court's opinion in Kohn v. United States, 680 F.2d 922 (2d Cir. 1982), which the parties have not cited, does not compel a different result. In Kohn, the parents of a soldier who had been murdered by a fellow soldier pleaded a variety of claims against the United States on their son's behalf and on their own. Kohn is chiefly concerned with the government's defense under Feres v. United States, 340 U.S. 135, 71 S. Ct. 153 (1950), from which the only surviving claim was one (asserted on behalf of the parents) for intentional infliction of emotional distress on the ground that they were denied truthful information concerning their son's death. See id. at 924. The parents characterized their cause of action as arising out of the "'suppress[ion] of information from, or release [of] fraudulent information to' them," and the government invoked the Federal Tort Claims Act ("FTCA"), which, as does the FSIA, preserves sovereign immunity for

claims arising out of misrepresentation.[4] See id. at 924, 926. We remanded for trial in Kohn, which is the relief Efua Cabiri seeks on this appeal.

Kohn was skeptical about the government's FTCA immunity defense: the Court pointed out that the exceptions for misrepresentation and deceit "have generally been applied only to actions for damages due to commercial decisions that were predicated on incorrect or incomplete information." Id. at 926. In so stating, the Court relied on a footnote in United States v. Neustadt, which observes (i) that "a motor vehicle operator's negligence in giving a misleading turn signal" does not "arise out of misrepresentation" within the meaning of the FTCA; (ii) that "so far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit," and (iii) that the tort of misrepresentation has "very largely" been confined to "the invasion of interests of a financial or commercial character, in the course of business dealings." United States v. Neustadt, 366 U.S. 696, 711 n.26, 81 S. Ct. 1294, 1302 n.26 (1961) (alterations, internal quotations marks and citations omitted).

But Kohn stopped well short of holding that the United States had waived sovereign immunity for non-commercial

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[4] See 28 § U.S.C. 2680(h) (1994). The FSIA House Report provides that "[t]he exceptions provided in subparagraph[] . . . (B) of section 1605(a) (5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. 2680(a) and (h)." H.R. Rep. No. 94-1487, at 21 (1976), reprinted in, 1976 U.S.C.C.A.N. 6604, 6620.

torts arising from its suppression of information or its release of information that was fraudulent. Indeed, the panel in Kohn had no occasion to decide that question because the Kohns successfully argued on appeal that they should be permitted to amend their remaining cause of action to allege a host of additional allegations (e.g., that the Army "negligently failed to provide an honor guard for their sons burial," and "wrongfully sent a copy of their son's autopsy report complete with photographs to their home"), many of which have nothing to do with representations or concealments, and do not remotely sound in misrepresentation or deceit. See id. at 924, 927. The Court in Kohn could therefore say (without deciding): we do "not believe that appellants' claims are necessarily barred as an action for misrepresentation or deceit"; by remanding, the Court did not mean "to suggest that on remand, appellants w[ould] necessarily be able to satisfy all relevant jurisdictional requirements." Id. at 926, 927 (emphasis added). In short, our opinion in Kohn might have resolved the issue considered on the present appeal (if this Court had not allowed the plaintiffs to amend their cause of action), but did not settle the question.

The district court's dismissal of Efua Cabiri's claim for intentional infliction of emotional distress is affirmed.

III The Implied Waiver Exception

Finally, plaintiffs argue that their claims fall within the implied waiver exception of the FSIA, § 1605(a) (1), which provides: "A foreign state shall not be immune from the jurisdiction of courts of the United States" where "the foreign state has waived its immunity either explicitly or by implication." The Cabiris argue that Ghana implicitly waived

its sovereign immunity by beginning the eviction proceeding.

"We and other courts have observed that the implied waiver provision of Section 1605(a) (1) must be construed narrowly." Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 243 (2d Cir. 1996) (internal quotation marks and citations omitted), cert. denied, 117 S. Ct. 1569 (1997). We have previously suggested that § 1605(a) (1) requires that the plaintiff demonstrate proof of a subjective intent to waive immunity. See Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari, 12 F.3d 317, 327 (2d Cir. 1993) (quoting with approval statement in Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 378 (7th Cir. 1985), that "waiver would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so" (emphasis omitted)); see also Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 (D.C. Cir. 1994) ("[T]he amici's jus cogens theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a) (1)."); 15 James Wm. Moore et al., Moore's Federal Practice § 104.12 [1] [a], at 104-33 (3d ed. 1998) ("Courts will rarely find that a nation has waived its sovereign immunity without strong evidence that waiver was what the state intended."). For example, in Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1017 (2d Cir. 1991), we pointed out that the House Report lists examples of implicit waiver "in which the waiver was unmistakable, and courts have been reluctant to find an implied waiver where the

circumstances were not similarly unambiguous."[5]

In Smith, we noted that the concept of implied waiver can be read to apply to three different types of circumstances: (a) where a subjective intent to waive immunity has been demonstrated; (b) where the foreign state has taken an act that objectively can be interpreted as exhibiting an intent to waive immunity; or (c) where a foreign state has taken acts that forfeit its right to immunity, irrespective of whether it has intended to do so. See Smith, 101 F.3d at 243. However, we reserved decision on which of the three possible meanings of waiver was intended by Congress, finding it sufficient to hold that waiver could not be implied from a state's membership in the community of nations. See id. at 244-45. Here, Ghana has taken no action that can be understood to demonstrate either an objective or a subjective intent to waive immunity with respect to these claims; and Ghana's commencement of proceedings in New York to evict plaintiffs from a house that Ghana owns (even if occupancy is arguably the contractual perquisite of an employment relationship frustrated by Ghana's wrongful detention and torture of its employee in

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[5] The House Report to the FSIA gives three examples of an implied waiver: (i) "where a foreign state has agreed to arbitration in another country"; (ii) "where a foreign state has agreed that the law of a particular country should govern a contract"; or (iii) "where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." H.R. Rep. No. 94-1487, at 18 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6617. "We recognize that the examples given in the House Report are not necessarily the only circumstances in which an implied waiver might be found." Smith, 101 F.3d at 244.

Ghana) does not require us to decide the circumstances, if any, under which a foreign state forfeits immunity.

Plaintiffs' immunity argument rests entirely, and precariously, on Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992), in which it was alleged that Argentina (i) kidnapped and tortured Siderman, who then sold part of his large Argentine land holdings and fled with his family to asylum in the United States; (ii) altered land records to promote a spurious criminal prosecution against Siderman for selling land he did not own; (iii) presented letters rogatory in a California court in aid of that prosecution; and (iv) unsuccessfully sought Siderman's extradition from a third country. See id. at 703. Siderman's subsequent federal lawsuit, seeking damages from Argentina for torture and other persecutions, was dismissed by the district judge, but revived by an adventurous panel of the Ninth Circuit on the ground that Argentina may have waived sovereign immunity by seeking the assistance of a court in the United States in furthering a scheme of persecution from which Siderman's claim arose. See id. at 721-22. The panel left it "up to the district court on remand to determine whether the requisite direct connection exists." Id. at 722.

Plaintiffs build an analogy with Siderman by alleging that the purpose of Ghana's eviction proceeding was to force the Cabiri family's repatriation, and was therefore a step in Ghana's scheme to persecute and torture the Cabiri family. However, as the district court pointed out, see Cabiri v. Government of the Republic of Ghana, 981 F. Supp. 129, 134 (E.D.N.Y. 1997), eviction would have compelled the Cabiris to vacate the house in Westbury, not to return to Ghana. Moreover, the eviction proceeding was brought after Cabiri

had been released by the authorities in Ghana, and after the acts that are the subject of these claims are alleged to have occurred. We agree with the district court that the eviction action lacks a direct connection to the Cabiris' claims in this lawsuit.

We are unpersuaded by the analogy to Siderman. Siderman itself relies on largely inapt citation to cases in which the issue was whether treaties or written agreements entered into by foreign sovereigns contemplated the adjudication of disputes by courts in the United States. See id. at 721. The implicit theory of Siderman is new and dubious, and seems to be that a foreign state forfeits immunity with respect to matters related to a scheme of persecution if it advances that scheme by bringing suit in the United States. Even assuming that Siderman were sound and persuasive, the opinion itself disclaims the broader reach that the Cabiris claim for it.[6]

Finally, plaintiffs' argument for implied waiver is (at least) in tension with the FSIA's separate exception to immunity for counterclaims "arising out of the transaction or occurrence that is the subject matter of [a] claim" brought by the foreign state. 28 U.S.C. § 1607 (1994). We conclude supra that except for the breach of contract claim, none of these claims arises out of the same transaction or occurrence

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[6] The panel cautioned: "Only because the Sidermans have presented evidence indicating that Argentina's invocation of United States judicial authority was part and parcel of its efforts to torture and persecute Jose Siderman have they advanced a sufficient basis for invoking that same authority with respect to their causes of action for torture." Id. at 722.

as the eviction proceeding. To allow plaintiffs to establish waiver on the basis of a connection between Ghana's eviction proceeding and causes of action that do not come within the counterclaim exception would in effect broaden the application of the counterclaim exception beyond the parameters intended by Congress.

CONCLUSION

The judgment of the district court is affirmed insofar as it dismissed Bawol Cabiri's claims for abuse of trust, fraudulent misrepresentation, and false imprisonment and insofar as it dismissed both Cabiris' claims for intentional infliction of emotional distress claims, but is reversed insofar as it dismissed Bawol Cabiri's breach of contract claim, and as to that claim is remanded for further proceedings.

VAN GRAAFEILAND, Circuit Judge, concurring in part and dissenting in part

I concur with my colleagues that the district court's dismissal of Bawol Cabiri's breach of contract claim should be reversed. I cannot agree, however, with their handling of Efua Cabiri's claim for the infliction upon her of mental and emotional distress.

The infliction of mental or emotional distress is a separate and distinct tort, not to be confused with other more commonly known torts. See Long v. Beneficial Finance Co. of New York, Inc., 39 A.D.2d 11, 14 (N.Y. 1972); Restatement (Second) of Torts § 46 cmt. (b) (1965). It is not a "claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or

interference with contract rights," with respect to which a foreign state still can claim immunity from liability under 28 U.S.C. § 1605(a) (5) (B). See Gross v. United States, 676 F.2d 295, 304 (8th Cir. 1982).

The House Report referred to by my colleagues, supra, at 16, provides in part as follows:

> The purpose of section 1605(a) (5) is to permit the victim of a traffic accident or other noncommercial tort to maintain an action against the foreign state to the extent otherwise provided by law. (emphasis supplied)

Under the heading "The Non-Commercial Tort Exception," (supra, at 14), my colleagues correctly cite "misrepresentation" and "deceit" as actions against which a foreign state may continue to claim immunity. They then state that "the wrongful acts alleged to have caused [Efua's] injury are misrepresentations made to Efua Cabiri concerning her husband's whereabouts." (supra, at 15). Ergo, they conclude, Ghana was entitled to immunity from Efua's claim. I disagree.

The fallacy in this reasoning is that claims for misrepresentation and deceit generally are limited to actions which involve commercial decisions predicated on incorrect or incomplete information. See Block v. Neal, 460 U.S. 289, 296 n.5 (1983) (citing United States v. Neustadt, 366 U.S. 696, 711 n.26 (1961)); Kohn v. United States, 680 F.2d 922, 926 (2d Cir. 1982); Salter v. United States, 853 F. Supp. 389, 394 (M.D. Ala. 1994). This limitation accords with the

traditional interpretation of actions based on misrepresentation and deceit, which require a showing of tangible or pecuniary loss. See, e.g., Cumberland Oil Corp. v. Thropp, 791 F.2d 1037, 1043-45 (2d Cir.), cert. denied, 479 U.S. 950 (1986); Day v. Avery, 548 F.2d 1018, 1029 (D.C. Cir. 1976), cert. denied, 431 U.S. 908 (1977); Leung v. Lotus Ride, Inc., 198 A.D.2d 155, 156 (N.Y. 1993); Urtz v. New York Central and Hudson River Railroad, 202 N.Y. 170, 173 (1911); 37 C.J.S. Fraud § 52.

The above-mentioned House Report also states:

> The exceptions provided in subparagraphs (A) and (B) of section 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. § 2680 (a) and (h).

Indeed, the pertinent immunity provisions of § 2680 (h) are identical with those of § 1605; i.e., "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights."

I deem it significant that five Circuits, including the Second, see Kohn, supra, have held that claims based on the intentional infliction of emotional distress do not fall within the definition of torts listed in the above-quoted section 2680(h). See Truman v. United States, 26 F.3d 592, 596-97 (5th Cir. 1994). I believe, therefore, that they do not fall within the definitions of torts listed in 28 U.S.C. § 1605(a)(5)(B).

The district court avoided this issue by stating that "[e]ven those allegations asserted by Mrs. Cabiri, stating that she was subjected to mental abuse when she was refused information about her husband, involve alleged conduct of Ghanian officials acting in Ghana." 981 F. Supp. 129, 132. Apparently, the district court was confusing wrongs against Bawol, which did take place in Ghana, with the wrong against Efua, which took place in the United States. My colleagues, however, address the matter directly by holding that "Efua Cabiri's claim for intentional infliction of emotional distress is outside the FSIA's exception for noncommercial torts committed in the United States." Supra, at 3. They say:

> Ghana enjoys immunity as to this claim--for emotional injury caused by the refusal of a foreign state, however nefarious, to give its citizens in the United States full or truthful information concerning its operations. The FSIA is not an enforcement mechanism for global freedom of information. Supra, at 16.

This, I suggest, is not a correct statement of the issue now before us and the law pertinent to that issue.

The real issue, as I see it, is whether the refusal of Ghana representatives to give the worried and distressed Efua any information about her missing husband constituted sufficiently extreme and outrageous conduct to bring it within the ban of emotional distress causation. I am not satisfied that this issue can be decided justly in the instant case by way of a Rule 12(b) (1) motion. See Spencer v. Casavilla, 903 F.2d 171, 173 (2d Cir. 1990).

I would permit Efua to go to trial with her husband.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. NEW YORK

[Filed October 22, 1997]

No. CV 95-5386

BAWOL CABIRI AND EFUA CABIRI,
Plaintiffs.

v.

GOVERNMENT OF THE REPUBLIC OF GHANA,
Defendant.

MEMORANDUM AND ORDER

WEXLER, District Judge.

I. BACKGROUND

Plaintiff Bawol Cabiri ("Cabiri") was a trade representative to the United States appointed by the Ghanian Government in 1983 to serve in New York. He and his family were provided with a home on Marietta Drive in Westbury, New York which was owned by the defendant the Republic of Ghana.

Plaintiffs' Underlying Allegations

Plaintiff Bawol Cabiri alleges that prior to July 1986, officials of Ghana formulated a scheme to deprive him of the benefits of his position as trade counsellor, and subject him to torture, false imprisonment, false arrest, physical and mental abuse, and internal exile. Cabiri was recalled to Ghana in July 1986 for consultations regarding shipments of grain. Cabiri alleges that this recall was a ruse to repatriate him, that he was forcibly removed from the ministry of trade in Ghana where he had reported, and was imprisoned for nearly a year in detention camps.

While Cabiri was being held, Ghanian officials purportedly subjected his wife, Efua Cabiri, to threats and intimidation. Mrs. Cabiri was given no information as to her husband's whereabouts or physical condition.

Ghana claims that Cabiri was retired from his post on October 31, 1986. Cabiri argues that his retirement was attempted retroactively by a letter dated April 16, 1987, and was not effective. In June 1991, Cabiri was allowed to leave Ghana and return to the United States. The State Department granted Mrs. Cabiri asylum in the United States in 1988, and granted Mr. Cabiri asylum in 1993.

The Real Property Proceeding

In October 1987, Ghana commenced a summary proceeding in the District Court of the State of New York located in Hempstead pursuant to New York State Real Property Actions and Proceedings Law § 713(11) (RPAPL") (the "Real Property Proceeding") to dispossess the Cabiris

from the Westbury residence. [FN1] In addition to alleging defenses to this action, Mrs. Cabiri asserted counterclaims on behalf of herself and her husband (who was then detained in Ghana). The counterclaims included intentional infliction of emotional distress, prima facie tort, and breach of contract.

> FN1. RPAPL § 713 provides for summary dispossess proceedings under specified grounds. The relevant grounds for this action found in subsection 711(11) state:
> The person in possession entered into possession as an incident to employment by petitioner, and the time agreed upon for such possession has expired or, if no such time was agreed upon, the employment has been terminated; no notice to quit shall be required to maintain the proceeding under this subdivision. N.Y. Real Prop. Acts. Law § 713(11) (McKinney 1984).

After the Cabiris, served discovery requests for their counterclaims, the parties reached a settlement as to the dispossess action, and agreed to dismiss the counterclaims so that they could be brought before this court. The parties agreed that any defenses that Ghana could assert in the federal action under the Foreign Sovereign Immunities Act or the Act of State Doctrine would be waived to the extent they had been waived in the Real Property Proceeding. [FN2]

> FN2. Section 6 of the Stipulation and Settlement of Agreement dated July 31, 1995 states:
> It is the intention of the parties that neither

> Foreign Sovereign Immunity nor the Act of State Doctrine provide [Ghana] a defense to the Counterclaim Suit if such a defense was unavailable before this Court, prior to this Court's decision to sever the counterclaims. Therefore, [Ghana] agrees to waive any defense which may be available to it under the Act of State Doctrine if such a defense was unavailable to it any time prior to December 19, 1994. Further, [Ghana] waives any immunity it may possess under the Foreign Sovereign Immunities Act, or was otherwise unavailable to [Ghana] at any time prior to December 19, 1994. Not withstanding anything herein to the contrary, Ghana does not waive any foreign sovereign immunity except to the extent such immunity has at any time been waived.

II. DISCUSSION

[1][2][3][4] This case is before this Court upon defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to FRCP Rule 12(b)(1). The Foreign Sovereign Immunities Act (the "FSIA") provides the sole source of subject matter jurisdiction over foreign sovereigns in suits brought in United States courts. 28 U.S.C. § 1602 et seq.; see Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434, 109 S. Ct. 683, 688, 102 L.Ed.2d 818 (1989); see also Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1017 (2d Cir. 1991) (citations omitted); Letelier v. Republic of Chile, 748 F.2d 790, 793 (2d Cir. 1984) (citations omitted). As a rule, a foreign state is immune from

the jurisdiction of the courts of the United States unless one of the specific exceptions contained within sections 1605 or 1607 of the Act is found to apply. 28 U.S.C. § 1604: see Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 48889, 103 S.Ct. 1962, 1968-69, 76 L.Ed.2d 81 (1983); Carey v. National Oil Corp., 592 F.2d 673, 676 (2d Cir. 1979) (footnote omitted). Only if it is determined that a foreign state is net entitled to immunity does the FSIA confer original jurisdiction on district courts. 28 U.S.C. § 1330(a); Verlinden, 461 U.S. at 489, 103 S. Ct. at 1969 ([I]f the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction"); see also Shapiro, 930 F.2d at 1017 (citing § 1330(a)). If subject matter jurisdiction exists, the foreign sovereign is liable in the "same manner and to the same extent as a private individual under like circumstances." Verlinden, 461 U.S. at 488-89, 103 S. Ct. at 1969-70 (quoting § 1606) (footnote omitted.)

Plaintiffs admit that defendant constitutes a "foreign state" as defined by § 1603(a) of the FSIA. Therefore, the burden now shifts to plaintiffs to come forward with some facts which would allow this Court to find that an exception to the Act applies. See Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285, 289 n. 6 (5th Cir. 1989); Olsen ex rel. Sheldon v. Mexico, 729 F.2d 641, 644 (9th Cir. 1984). Plaintiffs raise three different exceptions to sovereign immunity to this case to confer jurisdiction upon this Court. They are the tort exception, the counterclaim exception and the implied waiver exception. For the reasons stated below, this Court finds that no claim falls within any of the exceptions set forth by the Act.

The Tort Exception

[5] Section 1605 (a)(5) of the FSIA provides in relevant part that:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

> (5) . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment . . . .

The FSIA applies only when the tortious acts or omissions of a foreign state occur in the United States. Relying upon legislative history, this Court has previously held that § 1605(a)(5) applies only when the entire tort takes place in the United States. See Fickling v. Commonwealth of Australia, 775 F.Supp. 66, 72 (E.D.N.Y.1991). In the case at bar, the Cabiris' claims include allegations of torture, false imprisonment and physical and mental abuse. All of these claims involve alleged conduct and injuries that took place in Ghana, and not in the United States. Even those allegations asserted by Mrs. Cabiri, stating that she was subjected to mental abuse when she was refused information about her husband, involve alleged conduct of Ghanian officials acting in Ghana. Therefore, the Cabiris cannot meet the requirements of the tort exception to the FSIA because the

torts did not take place entirely in the United States.

Counterclaim Exception

[6] Section 1607 of the FSIA states in relevant part that:

> In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a state, the foreign state shall not be accorded immunity with respect to any counterclaim--
> (b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state

The intent of subsection (b) is to permit the filing of compulsory counterclaims. H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 23, reprinted in (1976) U.S.Code Cong. & Admire News at 6622. Because the "transaction or occurrence" language is also used in Fed. R.Civ. P 13(a) dealing with the filing of compulsory counterclaims, courts have relied upon the compulsory counterclaim test in analyzing the test for the FSIA counterclaim exception under § 1607(b).

The term "transaction or occurrence" has been interpreted liberally to effectuate the policies of the federal rules. See 6 Wright & Miller § 1410. "As a word of flexible meaning, 'transaction' may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. See Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750(926)." Warshawsky & Co. v. Arcata National Corp., 552 F.2d 1257, 1261 (7th Cir. 1977).

In re Oil Spill by the Amoco Cadiz, 491 F.Supp. 161, 168 (N.D.Ill.1979). In the case at bar there exists no logical relationship between the state court Real Property Proceeding and the Cabiris' claims in this action. The Real Property Proceeding involved a summary proceeding requiring evidence of Ghana's ownership of the Westbury residence and its right to possession. The claims before this Court are far more complex, involve actions that occurred primarily in Ghana, and are completely independent of the Cabiris, right to retain possession of the Westbury residence. Unlike the Real Property Proceeding, the evidence here would involve events and testimony that have nothing to do with the Westbury residence. Because the evidence required to assert or defend the Cabiris' claims of breach of contract, false imprisonment, torture and intentional infliction of emotional distress is so distinct from the evidence which would have been needed in a summary real property dispossess proceeding, this Court finds that there is no logical relationship between the claims. Therefore, even though Ghana had stipulated to waive its jurisdictional defense of sovereign immunity to the extent that it had during the Real Property Proceeding, the claims at bar do not fall under the counterclaim exception of the FSIA because they do not arise out of the same transaction or occurrences as the Real Property Proceeding.

Implied Waiver of Immunity

Section 1605 (a) of the FSIA removes jurisdictional immunity from a foreign state in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal

of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

Clearly, Ghana has agreed to a limited explicit waiver of immunity in this case by way of its stipulation with the Cabiris to sever and dismiss their counterclaims in the Real Property Proceeding. However, in accordance with the terms of that waiver, the Cabiris must show some implied waiver of immunity in the Real Property Proceeding to invoke the agreement as a waiver in this case. The Cabiris have advanced two distinct arguments that Ghana has waived its sovereign immunity implicitly.

[7][8] The Cabiris' first argument was that the treatment of Bawol Cabiri while he was detained in Ghana was so reprehensible that it amounted to a jus cogens violation. Jus cogens is a doctrine which recognizes certain fundamental international norms. The theory advanced by the Cabiris is that when a state enters the family of nations it agrees implicitly to adhere to these fundamental international norms. Because these norms are so universally accepted, the Cabiris argue that a state waives its sovereign immunity with respect to violations of these norms by merely holding itself out as a state. However, the Second Circuit has recently rejected this theory and absent something more, a jus cogens violation does not amount to an implied waiver of sovereign immunity. Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 244 (2d Cir. 1996).

[9] With respect to the Cabiris' second argument that Ghana impliedly waived its immunity, they rely upon a Ninth Circuit case holding that a foreign state which has involved the United States courts in a sham proceeding in furtherance

of its persecution of certain individuals has impliedly waived its right to claim immunity from suit by such individuals. Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992).

In Siderman de Blake, plaintiff Jose Siderman was an Argentina citizen of Jewish decent. When an anti-semitic military junta overthrew the government in 1976, ten masked men carrying machine guns forcibly entered the home of Jose and Lea Siderman. The men, acting under the direction of the military government, blindfolded, shackled and kidnapped Jose Siderman. They beat and tortured him for seven days, purportedly only because of his Jewish faith. At the end of the week, Siderman was told to leave Argentina or he and his family would be killed. The Sidermans left Argentina and joined their daughter Suzanna Siderman de Blake in the United States. In the process, Jose Siderman sold his interest in 127,000 acres of land at a steep discount. After the Sidermans left Argentina, their persecution did not end. Argentine military officers altered real property records to indicate that Jose owned only 127 acres of land prior to sale rather than 127,000. Moreover, they initiated criminal proceedings against Siderman in Argentina claiming that he sold land which did not belong to him. Argentina sought the involvement of United States courts in obtaining jurisdiction over Jose by use of a letter rogatory requesting that the Los Angeles Superior Court serve him with documents relating to the criminal action.

Siderman de Blake, 965 F.2d at 702-04. The Siderman de Blake court held that Argentina had waived its immunity because it "deliberately involved United States courts in its efforts to persecute Jose Siderman" Id. at 722. The Ninth

Circuit reasoned that implied waiver of immunity cases turn on whether "a sovereign contemplated the involvement of United States courts in the affair in issue." Id. at 721. Under those facts, Argentina not only envisioned a United States court's participation in its persecution of the Sidermans but deliberately implicated the court in its efforts to further persecute them. "If Argentina has engaged our courts in the very course of activity for which the Sidermans seek redress, it has waived its immunity as to that redress." Id.

Assuming without deciding that the Second Circuit would follow the reasoning of Sideman de Blake, this case is distinct from the facts of Sideman de Blake, and does not amount to an implied waiver of Ghana's sovereign immunity. Sideman de Blake involved a sham criminal proceeding. There was no legitimate role for the California court in that proceeding other than to further Argentina's attempt to repatriate and persecute Jose Sideman. By contrast, Ghana's use of the state court in this case involves a procedurally necessary method to repossess property which no one disputes is owned by them. The Cabiris do not claim that they owned the Westbury residence. Rather, they merely argue that they were entitled to possession under the terms of Bawol Cabiri's employment. The Cabiris do argue that the underlying goal of Ghana's dispossess action was to force Bawol Cabiri to return to Ghana. Presumably, once the Cabiris were evicted from the Westbury residence they would have nowhere to go but back to Ghana. This argument is not persuasive because the Cabiris would not be forced to leave this country merely because they were dispossessed of their residence. Under this logic, Ghana could never avail itself of a United States court to regain possession of its residence without opening itself up to a torture and false imprisonment suit by reason of an implied

waiver of immunity. Because the Real Property Proceeding involves a real dispute that would eventually require state court resolution, it does not compare to the sham criminal proceeding in Siderman de Blake which existed only to further the persecution of the Sidermans. Consequently, the Cabiris have failed to demonstrate an implied waiver of immunity by Ghana.

III. CONCLUSION

Because the Cabiris have not identified an exception to Ghana's sovereign immunity under the FSIA, their case must be dismissed for lack of subject matter jurisdiction. The Clerk of the Court is directed to close the case.

SO ORDERED.

Supreme Court, U.S.
FILED
MAY 21 1999
CLERK

(2)

No. 98-1722

IN THE

Supreme Court of the United States

BAWOL CABIRI and EFUA CABIRI,

Petitioners,

v.

GOVERNMENT OF THE REPUBLIC OF GHANA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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BRIEF STATEMENT OF THE CASE IN OPPOSITION

The petition in the case at bar is grounded upon both a flawed premise and the misstatement of key facts. The chief premise of the petition being that the plaintiff Efua Cabiri's claim, styled as the intentional infliction of emotional distress, arising from an alleged misrepresentation by the defendant Ghana, is excepted under the Federal Sovereign Immunities Act. That is, the petition argues that the defendant Ghana is subject to the jurisdiction of the District Court. The argument postulated in the petition is largely that of the Second Circuit dissenting opinion below. In brief, the dissent would hold that under FSIA Section 1605(a)(5)(B), though misrepresentation is the essence of the plaintiff's claim, and is one of the grounds where sovereign immunity applies, the complaint having been styled as a cause of action for the intentional infliction of emotional distress, immunity therefore is inapplicable. The dissent further postulates that sovereign immunity for misrepresentation applies only where commercial conduct is involved. The language of FSIA Section 1605(a)(5)(B) is analogized to that of the Federal Tort Claim Act Section 2860(h) and the cases thereunder. However, neither the Federal Tort Claims Act, nor the cases cited, apply to the facts in this case. This was the holding of the Second Circuit Majority Opinion below. And, moreover, it is the essence of the claim, not the style of the pleading, which determines the application of sovereign immunity under both the FTCA and the FSIA.

A second premise of the Petition is that the Ninth Circuit case of *Siderman de Blake* applies to the facts here. And also, that the Second Circuit's attack on *Siderman* will result

in "immunizing foreign nations from suit if they engage in offensive use of U.S. Courts". First, the facts in Siderman are not analogous to the facts here, and second, it is respectfully submitted, the Second Circuit Majority correctly perceived the potential for abuse by litigants who will look to *Siderman* to circumvent the otherwise clear application of sovereign immunity under the FSIA.

Finally, the Petition misstates the key facts, most especially, where it alleges that a landlord and tenant proceeding to recover possession of a Trade Representative's residence from the former Trade Representative, so that the new representative could take occupancy, is part of a "scheme" to persecute and torture the Cabiris in the United States. Instead, the Cabiris lived rent-free for well over two years until possession was finally recovered.

In conclusion, the petition for certiorari by the plaintiffs-appellants fails to state an argument premised upon firm legal grounds, nor does it rest on a true and correct statement of the facts, and therefore it should be denied.

POINT I

PURSUANT TO FSIA SECTION 1605(a)(5)(B), THE DEFENDANT GHANA HAS SOVEREIGN IMMUNITY WITH RESPECT TO THE PLAINTIFF EFUA CABIRI'S CLAIM FOR MISREPRESENTATION, EXPRESSLY ACCORDED IMMUNITY UNDER THE STATUTE.

A. Under Both the FSIA and the FTCA The Focus is the Essence of the Claim not the Style of the Pleading: Misrepresentation is Recognized Under The FSIA As Sovereign Immune Conduct.

Under FSIA Section 1605(a)(5)(B) a foreign state possesses immunity for actions which arise out of misrepresentation.[1] In an attempt to avoid the proscription

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1. The text of 28 U.S.C. § 1605(a)(5):

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
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> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to —
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a

(Cont'd)

of the statute, the plaintiff Efua Cabiri has pled her claim as "the intentional infliction of emotional distress" resulting from misrepresentation. The Majority said of this:

> However cast, the wrongful acts alleged to have caused the injury are misrepresentations made to Efua Cabiri concerning her husband's whereabouts.

Majority Opinion below, 165 F.3d at 200.

The dissent on the otherhand, citing *Truman v. United States*, 26 F.3d 592 (5th Cir. 1994), argues simply that the claim of emotional distress does not fall within the definition of torts listed in FSIA Section 1605(a)(5). *See* 165 F.3d at 204.

However, the dissent mistakenly relies on *Truman* where the Fifth Circuit reversed the District Court finding that a claim by a government employee for sexual harassment was not barred by the Federal Tort Claims Act, 28 U.S.C. § 2860(h). This statute employs the same language as FSIA Section 1605(a)(5)(B) with respect to certain torts including misrepresentation. Even assuming that the two statutes can be read the same, which is not the case, (*see* Point IB *infra*), still *Truman* does not apply on

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(Cont'd)

> discretionary function regardless of whether the discretion be abused, or
>
> (B) *any claim arising out of malicious prosecution, abuse or process, libel, slander, misrepresentation, deceit, or interference with contract rights.*

the facts. In *Truman* the Fifth Circuit found that the District Court wrongfully dismissed the complaint per FTCA Section 2860(h), the District Court citing slander as a basis of sovereign immunity. The Fifth Circuit also noted that FTCA Section 2860(h) also provides that the U.S. Government may be held liable "if there would have been liability for negligent or wrongful conduct of a private person in accordance with the law of the place where the act or omission occurred." *See Truman v. United States*, 26 F.3d at 594 (5th Cir. 1994). Which is quite different from the FSIA. But putting this difference aside for the moment, the *Truman* case cannot be read to support the proposition proposed by the dissent, that by analogy to the FTCA, the plaintiff Efua Cabiri's claim for the intentional infliction of emotional distress should be permitted under the FSIA. The dissent argues that *Truman* permitted a plaintiff's emotional distress case to go forward notwithstanding the proscription for torts such as "slander", which in *Truman* would otherwise have been the basis for sovereign immunity. However, the Fifth Circuit made it clear that the cause of action for sexual harassment in *Truman* was a claim whose essence arose out of the intentional infliction of emotional distress. In the words of the *Truman* court, the intentional infliction of emotional distress "was essential to the plaintiff's claim". *See* 26 F.3d at 594-595. In this case, the very essence, the very core of the claim by the plaintiff Efua Cabiri, *is for misrepresentation*. That is, the letter she received concerning her husband's whereabouts was alleged by her to be a written misrepresentation of the true facts. Misrepresentation as above mentioned, is one of the express grounds for sovereign immunity per FSIA Section 1605(a)(5)(B). The *Truman* court, and the Majority here quoted above, leave no doubt that in applying sovereign

immunity, the proscription of the statute cannot be circumvented by the styling of the complaint. *See* the Majority Opinion at 165 F.3d at 200 above quoted, and *Truman*, 26 F.3d at 594 (5th Cir. 1994).

Cf. *Block v. Neal*, 460 U.S. 289 (1983), where this Court held that the failure to supervise the construction of the plaintiff's house was the essence of the claim against the government by the plaintiff borrower under the "FmHa" program, not misrepresentation. The court holding that the misstatements "were not essential to the claim". In *Block* sovereign immunity did not apply, therefore the Court affirmed the Sixth Circuit which reversed dismissal of the complaint. *See* 460 U.S. at 297.

In this case misrepresentation is the essence of the plaintiff's claim, and therefore, sovereign immunity applies pursuant to FSIA Section 1605(a)(5)(B). The Majority below should be affirmed through denial of the petition.

B. The FSIA and FTCA while Containing Similar Language on Misrepresentation, Are Far Different in Purpose: Moreover, There is No True Distinction Between Commercial and Non-Commercial Misrepresentation In the Application of Sovereign Immunity Under the Federal Sovereign Immunities Act.

The Federal Tort Claims Act and the Federal Sovereign Immunities Act differ in one fundamental and highly significant way. The enactment of the FTCA is a statute where the U.S. Government has intentionally and expressly given its consent to be sued, waiving its sovereign immunity. *See Truman v. United States*, 26 F.3d 592, 594

(5th Cir. 1994). The FSIA though operating to limit sovereign immunity of foreign states, in no way operates as a consent to be sued. *Cf. Smith v. Libya*, 101 F.3d 239, 242-244 (2nd Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997) (even acts of terrorism do not establish an intent to be sued or consent to jurisdiction in the United States.) Therefore the analogy between the statutes cannot be taken as a matter of course based solely on the similarity of the language.

Equally germane, the distinction posed by the dissent, applying FSIA 1605(a)(5)(B) immunity to commercially related misrepresentation only is in error. In doing this, the dissent relies on this Court's decision in *Block v. Neal*, 460 U.S. 289 (1983), citing footnote 5 in particular. In the footnote this Court referred to its earlier decision in *United States v. Neustadt*, 366 U.S. 696 (1961), which appeared to distinguish between *negligent* and *intentional misrepresentation* under the Federal Tort Claims Act. "Negligent misrepresentation" it was said in footnote 5, is of a "financial or commercial character." In *Neustadt* it so happened, the claim was in the nature of "negligent misrepresentation" rather than *intentional misrepresentation*. But the Court in *Block* did not say that *Neustadt* stood for limiting the application of sovereign immunity under the FTCA to "negligent misrepresentation" only. The Court in *Block* in fact defined both *negligent* as well as *intentional misrepresentation* as being the same in one fundamental way, both claims have "the communication of misinformation" as their essence. *See Block v. Neal*, 460 U.S. 295-297 (1983). And the *communication of misinformation* is exactly what the plaintiff Efua Cabiri alleges in her complaint. So not only does the analogy between the FTCA and the FSIA rest upon a debatable

premise, but even if the statutes were interpreted as the same, sovereign immunity would nevertheless apply in this case.

POINT II

REGARDING THE NINTH CIRCUIT CASE OF *SIDERMAN DE BLAKE*

A. The *Siderman* Case does not Factually Apply to the Facts in the Case at Bar

The case of *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993), is in no way comparable on the facts to the case at bar. The underlying doctrine enunciated in *Siderman* is that U.S. Courts cannot be used as an instrument of persecution without effecting an implied waiver of sovereign immunity. In *Siderman*, letters rogatory were sought from a United States District Court to serve a subpoena in connection with a sham criminal prosecution in Argentina premised upon anti-Semitism rather than a violation of law by Siderman. In the case at bar, a New York court was used to obtain possession of real property belonging to the defendant Ghana when the plaintiff Cabiri refused to vacate the premises. The bottom line fact is that the landlord and tenant proceeding to evict Cabiri was a lawful process under New York State Law, while the underlying proceeding in *Siderman* was patently unlawful, having made U.S. courts an unwitting accessory via the letters rogatory. In other words, the proper exercise of lawful process to recover real property cannot rationally be seen as comparable to the criminal abuse of process in aid of a sham proceeding in Argentina. The argument in the petition that the Cabiri

family was entitled to live "rent-free" or the defendant Ghana waives sovereign immunity is absurd. (*See* Petition at page 3.) As the Majority below pointed out, "eviction would have compelled the Cabiris to vacate the house in Westbury, not to return to Ghana." *See* 165 F.3d at 202.

B. Notwithstanding the Disagreement Between The Second and Ninth Circuits over the Doctrine Established by *Siderman*, the *Siderman* Case should Be Limited in its Application.

Finally, it is respectfully submitted, that though there may be a disagreement between the Second and the Ninth Circuit over the viability of *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993), the view of the Second Circuit is more correct. This becomes apparent by the very nature of this case and the petition itself, which relies on arguments rejected even by the dissent below, concerning implied waivers of sovereign immunity arising from the lawful exercise of state process. The *Siderman* case, because of its apparent broad principles by which sovereign immunity might be argued to have been waived by implication, invites abusive litigation brought by otherwise disgruntled foreign nationals whose claims have little or no connection to the United States.

CONCLUSION

The petition of the plaintiffs' should be denied as failing to raise appropriate legal issues for resolution by this Court.

Respectfully submitted,

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